

COMMENTARY

What constitutes medical negligence?

A current perspective on negligence versus malpractice.

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INTRODUCTION

Before defining what medical negligence is it is useful to distinguish medical malpractice from medical negligence. It is also necessary to deal briefly with informed consent because negligence cases often arise from a failure to obtain informed consent.

Medical malpractice is much broader than medical negligence, because it includes negligent and intentional acts or omissions. "Negligence" refers to conduct (i.e. how practitioners behave in particular circumstances). "Intention" refers to practitioners directing their minds to do something which they know to be unlawful.

Examples of negligent acts or omissions that may result in legal action include: Negligently conducting an operation and causing brain damage to a patient;⁽¹⁾ or negligently failing to obtain an informed consent.⁽²⁾ Examples of intentional acts or omissions that could give rise to legal liability are: Unlawfully and intentionally breaching confidentiality (i.e. invasion of privacy);⁽³⁾ or unlawfully and intentionally failing to obtain an informed consent (i.e. assault).⁽²⁾ The question of whether or not the patient gave a proper informed consent is an issue frequently raised in medical malpractice and medical negligence cases.

ABSTRACT

Medical negligence needs to be distinguished from medical malpractice. Medical malpractice includes both negligent and intentional wrongful acts. Medical negligence occurs when practitioners fail to exercise the standard of skill and care expected of reasonably competent practitioners in their branch of the profession. Negligence refers to behaviour – not a state of mind – and is measured objectively. Medical practitioners may be held vicariously liable for negligent wrongful acts committed by persons employed by them while acting in the scope and course of their employment. Employees are people who can be told what to do and how to do a particular job. Vicarious liability does not apply to independent contractors who can be told what to do but not how to carry out the work. At present unfair exclusion clauses that take away the rights of patients and other healthcare users may be upheld by the courts provided they are not unconstitutional or contrary to public policy. This is likely to change when the Consumer Protection Act (CPA) comes into effect on 1 April 2011. The damages awarded for medical negligence are calculated to put the injured person in the position he or she would have been had the wrongful act or omission not been committed.

SAHeart 2010; 7:248-251

INFORMED CONSENT

It has been said that obtaining proper informed consent is usually regarded as a time-consuming task that is "a diversion from the work for which a surgeon is uniquely qualified".⁽⁴⁾ However, in law there is no doubt that there is a legal obligation on medical practitioners to obtain informed consent before treating or operating on patients.

The courts have held that informed consent means that the patient has:

- Knowledge of the nature and extent of the harm or risk;
- An appreciation and understanding of the nature of harm or risk;

- Consented to the harm or assumed the risk of harm; and
- Consented to the entire transaction, including all its consequences.⁽⁵⁾

In addition, the patient must have legal capacity and the consent must not be contrary to public policy.

The duty rests with the treating or operating medical practitioner or treating health care practitioner to obtain consent. Furthermore, submission by the patient is not consent unless the patient has full knowledge of the nature and consequences of the proposed treatment or procedure.⁽⁶⁾

The National Health Act (NHA) provides that - as part of informed consent - every health care provider must inform a user (i.e. a patient) of:

- The user's health status - except where it would be contrary to the best interests of the user;
- The range of diagnostic procedures and treatment options available to the user;
- The benefits, risks, costs and consequences generally associated with each option; and
- The user's right to refuse health services – including an explanation of the implications, risks and obligations of such refusal.

In addition, the health care provider must inform the user about the above requirements in a language that the user understands and in a manner that takes into account the user's level of literacy.⁽⁷⁾

Therefore, patients must have substantial knowledge concerning the nature and effect of the procedures consented to which means that they must be warned about “material risks”. The courts have held that risks are “material” if:

- A reasonable person in the position of the patient would attach significance to it; and
- A medical practitioner should reasonably be aware that the patient, if warned of the risk, would attach significance to it.⁽⁵⁾

MEDICAL NEGLIGENCE

In the context of medical negligence it is necessary to:

- Define the concept;
- Discuss the standard of care required;
- Consider how the courts deal with evidence of negligence;
- Discuss the concept of vicarious liability;
- Consider the question of exclusion clauses; and
- Mention the consequences of medical negligence.

Definition of medical negligence

Medical negligence means that a medical practitioner has failed to exercise the degree of skill and care that is expected of a reasonably competent practitioner in that particular branch of the profession.⁽⁸⁾ This means that the more complicated the procedure – the greater will be the degree of skill and care required⁽⁹⁾ – although the courts will take into account the resources available to the health care practitioner at the time.⁽¹⁾ An error in diagnosis is not necessarily negligence – the test is whether a reasonable practitioner in the same branch of medical practice would have made a similar error.⁽¹⁰⁾ However, a failure to warn patients of certain symptoms that may arise post-operatively that require the patient to return to the practitioner for further treatment (e.g. tight plaster casts resulting in Volkmann's contractures), may constitute negligence.⁽¹¹⁾

Standard of care required

Medical practitioners are regarded as skilled persons and therefore the standard of care required of them is that of a reasonably competent practitioner in their branch of the profession faced with a similar situation.⁽⁸⁾ The test is whether a reasonably competent practitioner in their position would have foreseen the likelihood of harm and taken steps to guard against it. This means that there is no legal liability for unforeseeable complications.⁽¹²⁾ However, liability will be imposed if the harm was caused because the patient suffered from an idiosyncrasy that could have been tested for and guarded against.

As previously mentioned, the greater the risks involved in a particular procedure the greater will be the skill and care required of the practitioner concerned. In cases of a sudden emergency the

courts will consider relaxing the usual standard of care although the standard required of the practitioner will still be that of a reasonably competent practitioner in the field who is faced with a similar emergency. This relaxation of the standard, however, may not be applied by the courts where the practitioner concerned had caused the sudden emergency through their negligence.⁽⁶⁾

Evidence of negligence

The degree of skill and care required in a particular branch of the profession is a question of evidence. The courts will not rely on medical evidence alone to decide risks, and medical opinion not supported by logic will be disregarded by the courts. Likewise, professional opinion overlooking obvious risks will not be relied upon. The courts and not the profession decide the standard of care, and spurious defences will result in adverse costs awards against practitioners who raise them.⁽¹³⁾

The courts in South Africa do not accept “*res ipsa loquitur*” or the “facts speak for themselves” doctrine in medical cases. The doctrine states that if some unexplained event occurs that does not normally happen unless somebody has been negligent the courts will infer negligence by that person unless he or she gives a reasonable explanation indicating that there was no negligence on their part. Thus it has been held that just because a swab was left inside a patient did not necessarily mean that the surgeon was negligent – negligence by the surgeon still had to be proved, because the swab may have been left as a result of negligence by the theatre sister.⁽⁹⁾

Vicarious liability

Vicarious liability means that a person is liable for another person's act or omission even though the first person is not at fault. Vicarious liability applies where a person employs another as a “servant” (i.e. can tell the person what to do and how to do it), and the latter unlawfully harms a third person while acting “within the course and scope of their employment”.⁽¹⁴⁾ For example, if medical practitioners employ nursing sisters to assist them, and the nurses negligently or intentionally injure patients while acting in the course and scope of their employment, such practitioners will be held liable for their nurses' wrongful acts. The nursing sisters themselves will also be personally liable.⁽¹⁵⁾ However, injured patients usually sue the medical practitioners concerned instead of the nurses

because practitioners have access to more resources than the nurses to meet the patients' claims (e.g. professional liability insurance).

Medical practitioners and hospitals are not liable for negligent or intentional wrongful acts or omissions of employees who leave the course and scope of their employment and go off on “a frolic of their own”. For example, except in emergency situations, nurses should not try to undertake procedures that lie exclusively within the scope of practice of medical practitioners. Where nurses undertake such procedures outside of emergency situations their employers will not be vicariously liable. However, employers may be personally liable if they request or authorise nurses to carry out unlawful procedures beyond their scope of practice. The nurses will also be liable for their unlawful conduct and cannot raise the defence that their employer requested or authorised them to do the procedures.

Employers are not liable for the acts or omissions of independent contractors employed by them. Independent contractors are experts or specialists who can be told what to do but not how to do a particular task. For example, surgeons are not liable for the negligent acts or omissions of anaesthetists who assist them with operations unless they exercised control over them or negligently failed to prevent them from harming their patients.⁽¹⁶⁾ In such situations the surgeons are not vicariously liable but are personally responsible for negligently interfering with the work of the anaesthetist or failing to prevent the anaesthetist from harming the patient.

Exclusion clauses

An exclusion clause is a term in a contract designed to exempt one of the contracting parties from negligence or other forms of liability. The courts have held that it is not unconstitutional or against public policy for a hospital to contract out of liability for negligence by its employees. Generally a person who signs an exemption clause without reading it will be bound by its terms - unless he or she was misled into signing it. There is no general obligation on a party to a contract to inform the other party about the contents of the agreement where the latter can read them. The court has held that the fact that the one party subjectively did not expect an exemption clause in the hospital agreement is irrelevant, because nowa-

days such exemption clauses are the rule rather than the exception.⁽¹⁷⁾ However, when the Consumer Protection Act comes into effect on 1 April 2011 unfair exclusion clauses will no longer be able to be enforced by hospitals and other institutions or individuals.⁽¹⁸⁾

Consequences of medical negligence

Medical negligence that amounts to unprofessional conduct may result in disciplinary action by the Health Professions Council of South Africa. Medical negligence causing death may result in a conviction for culpable homicide.⁽¹⁹⁾ Civil liability for damages may arise from negligent treatment or operations.⁽¹⁾

Where the harm or injury arises from a negligent wrong (e.g. a negligent operation) the damages claimable are restricted to patrimonial loss or pecuniary damages that are measurable in monetary terms (e.g. loss of present and future earnings, present and future medical expenses, loss of support by dependants) as well as damages for loss of amenities of life, pain and suffering, etc.⁽²⁰⁾ The object of these damages is to try to put the plaintiff back in the position that he or she would have been had the injury or harm not occurred.

CONCLUSION

Medical malpractice includes both negligent and intentional wrongful acts. Medical negligence occurs when practitioners fail to exercise the standard of skill and care of reasonably competent practitioners in their branch of the profession. Medical practitioners may be vicariously liable for wrongful acts committed by persons employed by them while acting in the scope and course of their employment.

At present unfair exclusion clauses may be upheld by the courts provided they are not unconstitutional or contrary to public policy. However, this will change when the Consumer Protection Act comes into effect on 1 April 2011.

The damages awarded for medical negligence are calculated to put the injured person in the position he or she would have been had the wrong not been committed.

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